No. 85658-3

Court of Appeals No. 63299-0-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

ELSA ROBB, personal representative of the ESTATE OF MICHAEL W. ROBB,

Respondent

vs.

CITY OF SEATTLE, a municipal corporation; OFFICER KEVIN McDANIEL; OFFICER PONHA LIM,

Petitioners

CONSOLIDATED ANSWER TO AMICUS BRIEFS OF ASSOCIATION OF WASHINGTON CITIES AND THE WASHINGTON ASSOCIATION OF MUNICIPAL ATTORNEYS, ASSOCIATION OF WASHINGTON CITIES-RISK MANAGEMENT SERVICES AGENCY AND WASHINGTON ASSOCIATION OF SHERIFFS AND POLICE CHIEFS

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I. CONSOLIDATED ANSWER TO ARGUMENTS OF AMICI CURIAE

Respondent Elsa Robb ("Robb"), personal representative of the Estate of Michael W. Robb, submits this Consolidated Answer to the amici curiae memoranda filed on behalf of Petitioner City of Seattle.

A. The Court of Appeals Properly Analyzed and Applied Restatement (Second) Of Torts Rule §302B Comment e to the Factual Circumstances of the *Robb* Case.

Amici have not established any reason for this Court to grant a writ to consider this case. It is undisputed that in a Washington case involving affirmative acts and a recognizable high degree of risk of harm, Restatement §302B imposes a duty to protect against third party criminal acts. The *Parrilla* and *Robb* courts properly relied on the Supreme Court decisions in *Kim* and *Hutchins* to hold that in an affirmative act case, §302B establishes a source of duty of care.[1] While the Courts in *Kim* and *Hutchins* found that based on the particular factual circumstances of those cases, the comment e rule of §302B did not trigger a duty of care because the plaintiffs there had not presented evidence of affirmative acts exposing the injured party to a "recognizable high degree of risk of harm,"[2] the *Parrilla* and *Robb* courts found otherwise because the plaintiffs sufficiently plead or proved the predicate duty-triggering facts.

In *Parrilla*, the Court of Appeals found that a Metro bus driver who left his bus with the engine running and a visibly erratic passenger on

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[1] *Parrilla v. King Cy.*, 138 Wn. App. 427, 432-40, 157 P.2d 879 (2007); *Robb v. City of Seattle et. al.*, 159 Wn. App. 133, 139-44, 245 P.3d 242 (2010).
[2] *Kim v. Budget Rent A Car Systems, Inc.*, 143 Wn.2d 190,196, 15 P.3d 1283 (2001); *Hutchins v. 1001 Fourth Ave. Assoc.*, 116 Wn. 2d 217, 230-33, 802 P.2d 1360 (1991).

board, owed a duty of care to passengers injured in a collision between the bus and the automobile in which they were traveling, because the bus driver's affirmative acts in abandoning the bus, exposed plaintiffs to a recognizable high degree of risk of harm. 138 Wn. App. at 430. Correctly concluding that *Parrilla* was an analogous case, the *Robb* court held that based on the officers' affirmative acts and §302B comment e, Robb had established that defendants owed him a duty of care:

> [I]t should not be surprising that tort liability can be imposed if officers take control of a situation and then depart from it, leaving shotgun shells lying around within easy reach of a young man known to be mentally disturbed and in possession of a shotgun.
>
> A jury could find that the affirmative acts of the officers in connection with the burglary stop created the risk of Berhe coming back for the shells and using them intentionally to harm someone, a risk that was recognizable and extremely high. Under these circumstances, the officers owed Robb a duty in tort to protect against Berhe's criminal misconduct.

Robb, 159 Wn. App. at 147.[3]

Amici have cited no authority for the proposition that in an affirmative act case, Restatement §302B comment e does not establish a source of duty. It would be impossible to do so because there is no such case law. The Court of Appeals' decision is consistent with existing Washington jurisprudence and presents neither unique nor new issues. This is a simple negligence case in which the trial court and the Court of Appeals both correctly applied Washington law.

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[3] Amici do not dispute the facts which are set forth in *Robb*, 159 Wn. App. at 136-39 and in Robb's Answer to Petition for Review at 2-5.

In an attempt to distinguish this case, Amici contend that *Hutchins*, *Kim* and *Parrilla* all involved §302B comment e analyses in which the things involved in causing the party's injury belonged to the defendant actor, whereas the property involved here (the shotgun shells) did not. But nothing in Washington law or in §302B comment e suggests or even hints that such a distinction is critical or even relevant. Comment e tort liability is triggered when the defendant's "affirmative act" exposes the injured party to "a recognizable high degree of risk of harm." Comment e does not indicate that the defendant's affirmative act has to involve property owned or controlled by the defendant. The distinction which Amici seek to make is not relevant to a court's tort liability analysis under §302B comment e.

B. Amici's Argument that the Scope of the §302B Comment e Tort Rule is Limited to Factual Situations Described in the Restatement Illustrations is Contrary to the Language of Comment e Itself.

Negligence law is based in the common law, and its application and development, by definition, depends upon the facts and circumstances of particular cases. The case-specific application of negligence in a jurisdiction is neither constrained by nor limited to the Illustrations in the comments to particular Restatement sections. Amici attempt to limit the scope of §302B comment e tort liability to cases that precisely match the facts in the examples set forth in the accompanying Illustrations. This simplistic analysis not only is contrary to the common law nature of negligence, but it is contrary to the language of comment e itself. Amici's

argument is foreclosed by comment e's last two sentences. Comment e states:

> There are, however, situations in which the actor, as a reasonable man, is required to anticipate and guard against the intentional, or even criminal, misconduct of others. In general, these situations arise where the actor is under a special responsibility toward the one who suffers the harm, which includes the duty to protect him against such intentional misconduct; or where the actor's own affirmative act has created or exposed the other to a recognizable high degree of risk of harm through such misconduct, which a reasonable man would take into account. The following are examples of such situations. The list is not an exclusive one, and there may be other situations in which the actor is required to take precautions. (Emphasis supplied.)

As the Court of Appeals held, *Robb* clearly is one of those "other situations." As expressly noted, "[t]he list is not exclusive."

Comment (f) of §302B explains that determining the existence of a duty to take precautionary action requires "balancing the magnitude of the risk against the utility of the actor's conduct," and depends upon a variety of factors, including "the known character, past conduct, and tendencies of the person whose intentional conduct causes the harm"; "the temptation or opportunity which the situation may afford [a third person] for such misconduct"; " the gravity of the harm which may result," and "the burden of the precautions which the actor would be required to take." Analysis of these factors supports the Court of Appeals' finding of a comment e tort duty in this affirmative act case. Here, the officers knew that Berhe was unstable and dangerous and they knew he possessed a

deadly weapon – a shotgun. Despite that knowledge, and the grave risk Berhe posed, the officers controlled the burglary stop scene and then departed, leaving shotgun shells on the ground. Moments later, Berhe returned and picked up the shells and used one of them to fatally shoot Michael Robb. It would have been absolutely no burden whatsoever for the officers to pick up the shells and check them into the property room at the Precinct.

C. Amici's Attempts to Re-Characterize the Court of Appeals' Decision as a Failure-to-Act Case Rather than an Affirmative Act Case is Contrary to the Reasoned Analysis of the Court of Appeals Based on the Particular Circumstances Involved In *Robb*.

The Court of Appeals concluded that "[t]his is an affirmative acts case," based on the facts which demonstrated that the officers had

> take[n] control of a situation and then depart[ed] from it, leaving shotgun shells lying around within easy reach of a young man known to be mentally disturbed and in possession of a shotgun. A jury could find that the affirmative acts of the officers in connection with the burglary stop created the risk of Berhe coming back for the shells and using them intentionally to harm someone, a risk that was recognizable and extremely high.

Robb, 157 Wn. App. at 147.

Prosser and Keeton explained the distinction between an actor engaging in affirmative acts (misfeasance) and an actor failing to act (nonfeasance) as follows:

> In the determination of the existence of a duty, there runs through much of the law a distinction between action and inaction . . . [T]here arose very early a difference, still

> deeply rooted in the law of negligence, between "misfeasance" and "nonfeasance"—that is to say, between active misconduct working positive injury to others and passive inaction or a failure to take steps to protect them from harm. The reason for the distinction may be said to lie in the fact that by "misfeasance" the defendant has created a new risk of harm to the plaintiff, while by "nonfeasance" he as at least made his situation no worse, and has merely failed to benefit him by interfering in his affairs.[4]

In analyzing the distinction between misfeasance and nonfeasance for purposes of determining whether a duty exists in a negligence claim, it is the defendant's entire course of conduct that constitutes an affirmative act creating a risk of harm. Within that entire course of affirmative conduct, the particular negligence may consist of either action or inaction creating an unreasonable risk. A classic illustration of this point is the example of a driver who fails to apply his or her brakes to avoid hitting a pedestrian walking in a cross walk. Even though the driver's negligent act — failing to apply the brakes — is inaction, the driver's affirmative act is driving and the careless failure to apply the brakes is negligent driving not negligent nonfeasance or a mere omission by not applying the brakes.[5]

In this case, the proper analytical focus is on the officers' entire course of conduct once they commenced their burglary stop and investigation of Berhe and his companion and took control of the scene. That investigation lasted 20 minutes and ended with the officers departing from the scene of the stop and leaving the shotgun shells which they

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[4] W. Page Keeton, *Prosser and Keeton on the Law of Torts* §56, at 373 (5th ed. 1984).
[5] Thomas C. Galligan, Phoebe A. Haddon, Frank L. Maraist, Frank McClellan, Michael Rustad, Nicholas P. Terry, and Stephanie M. Wildman, *Tort Law: Cases, Perspectives, and Problems*, 359 (Lexis Nexis 4th ed. 2007).

actually saw lying on the ground, even though they knew that Berhe was mentally unstable and had possession of a shotgun. The entirety of the officers' conduct during the stop – analogous to the negligent driving – is the misfeasance (affirmative act) that exposed Robb to an "extremely high" degree of risk of harm even though leaving the shells on the ground without picking them up was a failure to do something – like the failure to apply the brakes. *Robb*, 157 Wn. App. at 147.

D. Under Washington Law, When the Negligence Claim is Based On Affirmative Acts of Police Officers, the Public Duty Doctrine and its Four Exceptions Do Not Apply.

As the Court of Appeals noted in *Robb*, when a negligence case against a police officer is based on affirmative acts, the public duty doctrine does not apply. The court reasoned that "the public duty doctrine 'provides only that an individual has no cause of action against law enforcement officials for failure to act. Certainly if the officers do act, they have a duty to act with reasonable care.' "159 Wn. App. at 147 (*quoting Coffel v. Clallam Cy.*, 47 Wn. App. 397, 403, 735 P.2d 686 (1987), *rev. denied*, 108 Wn.2d 1024 (1987).

Many other cases, cited in Robb's Answer to the Petition for Review (at 11-12), repeat this established principle. *See, e.g., Logan v. Weatherly*, 2006 U.S. Dist. LEXIS 37258, at ** 6-13 (E.D. Wash. June 6, 2006) (citing *Coffel*, court held that a police negligence claim arising from an affirmative act is not barred by the public duty doctrine and the four exceptions); and *Turner v. City of Port Angeles*, 2010 U.S. Dist. LEXIS 114447, at * 11 (W.D. Wash. Oct. 26, 2010) (court stated that under

Washington law, "Defendant incorrectly infers that police officers are never liable for their negligent conduct" (citing *Garnett v. City of Bellevue*, 59 Wn. App. 281, 287, 796 P.2d 782 (1990) (holding police officer liable for negligent infliction of emotional distress)).

Washington Attorney General Rob McKenna, the co-author of a law review article published in the Seattle University Law Review, stated that "[t]he public duty doctrine had one anomaly: it protected officials when they declined to act, but did not protect them when they acted." (Emphasis supplied.) [6] Amici has not cited any authority for the proposition that police officers' affirmative acts are not subject to scrutiny under negligence law.

The Court of Appeals correctly held that this case involves the commission of affirmative acts by police officers which under §302B comment e and the particular circumstances here, a jury could find that the officers exposed Robb to an "extremely high" recognizable risk of harm by virtue of their actions during the burglary stop which the officers controlled.

E. Amici's Argument Would Effectively Abrogate the Waiver of Sovereign Immunity Doctrine As It Relates to the Application of the §302B Comment e Tort Rule to Affirmative Actions of Police Officers.

In essence, Amici are asking this Court, contrary to the Legislature's broad waiver of sovereign immunity, to carve out a special immunity for law enforcement's negligent actions under §302B. This

[6] Michael Tardif & Rob McKenna, *Washington State's 45-Year Experiment in* Government *Liability*, 29 Seattle U. L. Rev. 1, 21 (2005).

Court has no power to grant such immunity. Only the Legislature has the power to do so.[7]

With the Legislature's abolition of sovereign immunity, government actors are liable in tort to the same extent as a private party or corporation. RCW 4.96.010(1). Hence, government actors are subject to the same tort duty analysis as private sector defendants.

The statutory waiver of sovereign immunity is categorical; it places no operational or economic limit upon a government actor's liability exposure. *See, e.g., Mason v. Bitton*, 85 Wn.2d 321, 328-29, 534 P. 2d 1360 (1975) (decision by police officer about whether or not to engage in a high speed chase was considered "operational" in nature and not a basic policy decision, and thus the City was not immune from a wrongful death suit.); *Bodin v. City of Stanwood*, 130 Wn.2d 726, 739-43, 927 P.2d 240 (1996) (rejecting a municipality's argument that limited economic resources provide a basis for a defense against claims of negligence).

Since the waiver of sovereign immunity, the Legislature has rejected invitations to create partial or complete protection from liability in the area of law enforcement. *See, e.g., Taggart v. State*, 118 Wn.2d 195, 224, 822 P.2d 243 (1992) (noting that Legislature can limit or eliminate the duty announced by the Court by passing a statute broadening parole

[7] Under Article II, § 26 of the Washington state constitution, the Washington legislature directs the manner in which suits may be brought against the state.

officers' immunity so as to include any actions taken in their official capacities. The Legislature has not chosen to do so.).[8]

In sum, this Court should reject Amicis' attempt to seek by judicial fiat the very sovereign immunity that the Legislature has rejected. *See Bishop v. Miche*, 137 Wn.2d 518, 529, 973 P.2d 465 (1999) ("With the abrogation of sovereign immunity, government entities may be subject to tort claims under common-law principles.")

F. Amici's *Terry* Stop Argument Should not be Considered by This Court Because it was not Raised in the Court of Appeals Nor in the Petitioner's Request for Review, and Because *Terry* Stop Principles Are Irrelevant Here.

Amici argue that the *Robb* decision should be reviewed because the breadth of its holding might lead police officers to violate the constitutional parameters of a *Terry* stop. Because the Petitioner did not raise the *Terry* stop issue in the Court of Appeals or in its Petition for Review, and Amici are not parties in this case, this Court should not consider the *Terry* stop argument. *See Cummins v. Lewis County*, 156 Wn. 2d 844, 851, 133 P.3d 458 (2006) (Court refused to accept for review a public duty doctrine issue raised solely by amicus and not by Petitioner in its request for review.); *State v. Mullin-Coston*, 152 Wn.2d 107, 120 n.6 (2004) (Court refused to consider issues raised only by amicus that petitioner had not addressed in his petition for review.).

[8] In the Seattle Law Review article, fn. 5, *supra*, Attorney General McKenna urged the Legislature to replace the current broad waiver of sovereign immunity with a scheme that precisely sets forth when the government is liable in tort. *Id.* at 50-52. The Legislature has refused to do so.

Just as importantly, this is not a *Terry* stop case dealing with whether or not the police violated a suspect's constitutional rights by seizing evidence during the course of an investigation. This is a simple negligence case based on affirmative acts of officers engaging in and controlling a burglary stop involving a suspect known to be mentally unstable and in possession of a shotgun. The stop ended with the officers departing from the scene, and leaving on the ground shotgun shells that were visible to them.

This factual scenario does not raise constitutional issues under *Terry*. Robb does not contend that the officers should have arrested Berhe. Nor does Robb contend that the officers should have more aggressively searched Berhe. Robb merely contends the officers should have picked up the shotgun shells which they admittedly saw.

It is clear that in evaluating the reasonableness of police action and the extent of any intrusion on the rights of others, each case must be considered in the light of the particular circumstances facing the law enforcement officer at the time. The *Robb* case paints a clear picture of officer negligence in the line of duty.

II. CONCLUSION

Amici argue that the essence of Robb's negligence claim is the officers' failure to arrest Berhe during the course of the investigative stop. This is not Robb's negligence claim, and not the basis of the Court of Appeals' decision. The Court of Appeals did not mention the officers' failure to arrest Berhe as being an issue of concern. Amici alone have

concocted this bogus claim. The only issue is whether, in light of the officers' knowledge about Berhe's mental instability and his possession of a shotgun, and their affirmative acts in taking control of the scene and investigation, they had a duty to exercise reasonable care and pick up the shotgun shells that they saw lying on the ground.

If the effect of *Robb* on police training is a concern for Amici, Robb offers a simple solution. In future police training throughout the State of Washington, trainers should make the *Robb* decision required reading by those attending, and police department policy and procedure manuals should contain a copy of (or reference to) the decision. Only through dissemination of the *Robb* opinion can police officers understand that under some very specific circumstances, a police officer's affirmative actions can result in a horrific crime which could have been prevented if the officers involved had acted reasonably.

This Court should not accept review because Petitioner and Amici have not shown that the *Robb* decision conflicts with any decision of the Washington Supreme Court or Court of Appeals, or any federal court decision. Nor have Petitioner or Amici shown that any public interest is adversely affected by the decision.

This case should be remanded for trial.

RESPECTFULLY SUBMITTED this 16 day of May, 2011.

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Elsa Robb, personal Representative of the Estate of Michael W. Robb v. City of Seattle, et al.
Washington Supreme Court No.: 85658-3

Dear Clerk of the Court:

Attached please find the following documents for filing in regard to the above matter:

1. RESPONDENT'S MOTION TO FILE OVERLENGTH ANSWER TO AMICUS BRIEFS OF ASSOCIATION OF WASHINGTON CITIES AND THE WASHINGTON ASSOCIATION OF MUNICIPAL ATTORNEYS, ASSOCIATION OF WASHINGTON CITIES-RISK MANAGEMENT SERVICES AGENCY AND WASHINGTON ASSOCIATION OF SHERIFFS AND POLICE CHIEFS;

2. CONSOLIDATED ANSWER TO AMICUS BRIEFS OF ASSOCIATION OF WASHINGTON CITIES AND THE WASHINGTON ASSOCIATION OF MUNICIPAL ATTORNEYS, ASSOCIATION OF WASHINGTON CITIES-RISK MANAGEMENT SERVICES AGENCY AND WASHINGTON ASSOCIATION OF SHERIFFS AND POLICE CHIEFS; and

3. CERTIFICATE OF SERVICE.

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Thank you
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